UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of: FRY'S ELECTRONICS, INC. Employer, and TEAMSTERS LOCAL 517, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Petitioner.	Case No. 32-RC-135431

EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DIRECTION TO HOLD ELECTION IN ABEYANCE

DAVID S. DURHAM
JOHN E. FITZSIMMONS
CHRISTOPHER M. FOSTER
DLA PIPER LLP (US)
555 Mission St., Ste 2400
San Francisco, CA 94105-2933
Telephone: 415.836.2500
Fax No: 415.836.2501

Attorneys for Employer,
FRY'S ELECTRONICS, INC.

I. INTRODUCTION

Pursuant to Sections 102.67 and 102.71 of the National Labor Relations Board's Rules and Regulations, Fry's Electronics, Inc. ("Employer") requests review of the Regional Director for Region 32's ("Region") October 27, 2014[1] direction that the election in the above-captioned matter previously scheduled for November 7 be cancelled and held in abeyance ("Abeyance Direction") indefinitely pending investigation of unfair labor practice charges filed by the Petitioner on October 21. The following reasons require granting this request:

- Substantial questions of law and policy are raised because of (i) the absence of, or (ii) departure from officially reported Board precedent;
- To the extent the Region is found to rely on valid Board precedent, there are compelling reasons for reconsideration thereof in light of important Board rules and policies; and
- The Region's action is, on its face, arbitrary and capricious.

II. FACTUAL BACKGROUND

On August 26, Teamsters Local 517, International Brotherhood Of Teamsters ("Petitioner" or "Union") filed a petition to represent a certain group of individuals employed by the Employer at its Hanford, California facility. A hearing regarding said petition was held on September 8.[2] On September 19, the Parties submitted post-hearing

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[1] All subsequent dates are in 2014 unless otherwise stated.

[2] At Hearing, the Parties disputed whether ten supervisors qualified as such within the meaning of Section 2(11) of the National Labor Relations Act (the "Act")

briefs, and on October 8 the Region issued its Decision and Direction of Election ("DDE"), and later scheduled an election for November 7.[3]

Then, on October 21, the Petitioner filed an unfair labor practice charge ("ULP Charge") (Attachment One). Six days later, the RD issued a formal letter to the Parties, stating:

> This is to notify you that the petition in the above-captioned case [32-RC-135431] will be held in abeyance and the election will not be conducted, pending the investigation of unfair labor practice charges in Case 32-CA-139198.
>
> (Attachment Two).

No further explanation, reasoning, or justification has been provided by the Region to date. Accordingly, for the reasons stated below, the Board should grant the present Request for Review of the Abeyance Direction.

III. LEGAL ARGUMENT

The Board should reject the Petitioner's strategic attempt to derail the employees' right to vote in a prompt, secret ballot election. It appears that the Petitioner knows it will lose the election and hopes that by delaying the day of reckoning, its fortunes will change. Frankly, the Employer doubts that the passage of time will help the Petitioner, but that is not the point. The employees and the Employer (*i.e.*, the only parties with an established relationship here) need and deserve closure on this matter, and to move forward. The Petitioner should not be allowed to deny the employees their right of

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[3] The Employer's Request for Review of the DDE was filed on October 22 and is currently pending before the Board. There, the Employer challenges the Petitioner's equally cynical manipulation (to that here) of the Board's processes whereby it strategically stipulated that three certain individuals classified as supervisors by the Employer qualified such within the meaning of Section 2(11) but that ten others also classified as supervisors by the Employer were not so qualified.

choice through a cynical manipulation of the Board's processes because they do not like what employees have to say. Indeed, the Petitioner's attempt to do so is contrary to Board precedent and policy objectives.

First and foremost, the Petitioner's allegations in the ULP lack factual foundation. Despite the Employer's urging of the Region in informal phone calls after the ULP Charge was filed to require the Petitioner to produce *any evidence* in support of its allegations (let alone the clear, direct and substantial evidence, which should be required at this point), the Region decided to cancel and block the election based on what the Employer believes are merely conclusory statements and unreliable hearsay evidence proffered by the Petitioner. This kind of evidence is too easily fabricated to serve as a basis for blocking the election. Indeed, the Board should not permit the Region to enable strategic blocking of elections by means of merely filing of an unfair labor practice charge.

Beyond that, absent independent threats or other coercion, the acts alleged by the Petitioner in its ULP Charge do not rise to the level of an 8(a)(1) even if, *arguendo*, assumed to be true.

The Petitioner's first allegation in the ULP Charge is that the Employer instigated and promoted the circulation of an employee petition to the Union presumably stating that employees were dissatisfied with the Union. It is preposterous to assert that any petition that may have been circulated was anything other than an expression of the employees' viewpoints. But putting this factual failure to the side for the sake of argument, it is simply not unlawful for an employer to "instigate or promote" the circulation of such a petition when the union is not the certified or recognized

representative of the employees. Of course, it is well established that it is unlawful for an employer to initiate a decertification petition, solicit signatures for the petition, or lend more than minimal support and approval. *Eastern States Optical Co., Inc.*, 275 NLRB 371, 372 (1985). However, an employer does not violate the Act by merely rendering "ministerial aid." *Times-Herald, Inc.*, 253 NLRB 524 (1980). To put it another way, the real standard is whether the "preparation, circulation and signing of the petition constituted the free and uncoerced act of the employees concerned." *KONO-TV-Mission Telecasting*, 163 NLRB 1005, 1006 (1967).

All of the above-cited cases occurred in the context of a decertification effort; that is, an attempt to oust an incumbent union, lawfully recognized or certified as the exclusive representative of the employees under Section 9 of the Act. As such, the unions in those cases had special rights and responsibilities guaranteed under law. They enjoyed a continued presumption of majority status that could only be rebutted by objective evidence of actual loss of majority support. In contrast, here, the Petitioner has no status whatsoever. It enjoys no presumption of majority support; it represents nobody. Accordingly, absent actual threats or other coercive conduct, it is simply not unlawful in the context of an election campaign for an employer to encourage employees who already oppose the Petitioner's efforts to express that dissatisfaction directly to them in the form of a petition. *Compare*, *SFO Good-Nite Inn*, 357 NLRB No. 16 (2011) (employer was found to have unlawfully supported an effort to oust the employees' *existing* bargaining representative).

The Petitioner's second allegation in the ULP Charge is that the Employer discouraged employees from attending a meeting with Petitioner. Again, the Employer

doubts that the Petitioner has, or will, be able to present any actual evidence in support of this vague and conclusory allegation. However, even assuming, *arguendo,* that such discouragement occurred, it is simply not unlawful (in the absence of threats or coercion) to discourage employees from attending a meeting where the union is not the statutory representative. For instance, in the case of *Elston Electronics Corp.*, 292 NLRB 510 (1989), the Board concluded, in disagreement with the Administrative Law Judge ("ALJ"), that the employer did not violate the Act when a supervisor informed employees (in the context of a union organizational drive), that since she had been told she could not attend union meeting, she did not think anyone should go, as the statement did not threaten or coerce any employees. In addition to being non-coercive, the ALJ found that her statement did not interfere with the union's role and responsibilities as the employees' representative, as it had no such status. Similarly, in *S.E. Nichols, Inc.*, 284 NLRB 556 (1987), *enf'd with mod. by* 862 F.2d 952 (2d Cir. 1988), the Board adopted the conclusion of the ALJ that the employer there did not violate the Act when, in the context of a union organizational drive, one of its managers "discouraged its employees from attending a Union meeting" by announcing that attendance at a union meeting was optional and that they were not required to attend. Again, absent threats or coercion, the statement, did not rise to the level of a violation of the Act.

Regarding the Petitioner's third allegation in the ULP Charge, that the Employer "retaliated against employees for engaging in Union activities," the Employer has no idea what this refers to, and it appears to be mere boilerplate. Accordingly, because there is no indication that the Petitioner has subsequently provided a more detailed allegation, let alone presented an iota of evidence to support such an allegation, the Region wrongly

relies upon such a barebones allegation to cancel and indefinitely postpone the scheduled election.

Regarding the Petitioner's fourth allegation in the ULP Charge, that the Employer engaged in unlawful "surveillance," the Employer, like in the case of the third allegation, has no idea what this refers to, so it assumes it is hollow boilerplate. However, in the context of examining the Petitioner's "evidence" if any, the standard here is an objective one and involves the determination of whether the Employer's conduct, under the circumstances, was such as would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act. *The Broadway*, 267 NLRB 385 (1983); *see also Metro-West Ambulance Service, Inc.*, 360 NLRB No. 124 (2014).

The Board has consistently held that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. *See e.g., Metal Industries, Inc.*, 251 NLRB 1523 (1980) (manager's presence in the plant parking lot while union was distributing leaflets was not a violation as his actions were not out of the ordinary since management regularly stationed themselves in the employees' parking lot at the end of the day to bid employees goodbye and answer any questions they might have.) The Board's analysis thus focuses on whether the observations were ordinary or whether the actions were unusual, repeated, or extensive and therefore coercive. *See, Aladdin Gaming, LLC*, 345 NLRB 585 (2005), *rev. denied*, 515 F.3d 942 (9th Cir. 2008) (employer whose employee dining room was regularly used by both managers and unit employees did not violate the Act when managers on two occasions approached employees during open union solicitation activity and spoke to

them about the employer's perspective on unionization at employer's facility, where managers' presence in dining room was routine and their observation of employees' union activities was unaccompanied by coercive conduct).

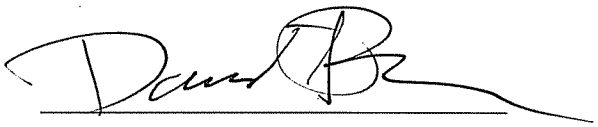
IV. CONCLUSION

For the above reasons, the Employer respectfully requests that the Board grants its Request for Review. The RD's Abeyance Direction departs from Board precedent, and undermines its policy objectives to uphold the "legitimate rights" of the Employer and its employees. To the extent that the Board may find that the Region's Abeyance Direction rests on valid Board precedent, there are compelling reasons for reconsideration of same; namely, that bare, conclusory allegations by a non-representative should not be capable of delaying an election that has already been scheduled. This is especially true where case law does not support a violation of the Act even if the Petitioner's allegations are taken at face value.

Dated: November 6, 2014

Respectfully submitted,

DLA PIPER LLP (US)



DAVID S. DURHAM
JOHN E. FITZSIMMONS
CHRISTOPHER M. FOSTER

Attorneys for Employer,
FRY'S ELECTRONICS, INC.

ATTACHMENT ONE

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 32
1301 Clay St Ste 300N
Oakland, CA 94612-5224

Agency Website: www.nlrb.gov
Telephone: (510)637-3300
Fax: (510)637-3315

October 27, 2014

David S Durham, Esq.
DLA PIPER LLP (US)
555 Mission Street
Suite 2400
San Francisco, CA 94105

John C. Provost, Esq.
BEESON, TAYER & BODINE, APC
520 Capitol Mall, Suite 300
Sacramento, CA 95814

Re: Fry's Electronics, Incorporated
Case 32-RC-135431

Dear Mr. Durham and Mr. Provost:

This is to notify you that the petition in the above-captioned case will be held in abeyance and the election will not be conducted, pending the investigation of the unfair labor practice charges in Case 32-CA-139198.

Right to Request Review: Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 099 14th Street, N.W., Washington, D.C. 20570-0001. The request for review must contain a complete statement of the facts and reasons on which it is based.

***Procedures for Filing Request for Review*:** A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business **(5 p.m. Eastern Time)** on November 10, 2014, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on November 10, 2014.

Consistent with the Agency's E-Government initiative, parties are encouraged, but not required, to file a request for review electronically. Section 102.114 of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the Efiling system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure

to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Very truly yours,

/s/ George Velastegui

George Velastegui
Regional Director

cc: Office of the Executive Secretary (by e-mail)

Christopher M. Foster, Esq.
DLA PIPER LLP (US)
555 Mission Street
Suite 2400
San Francisco, CA 94105-2933

John E. Fitzsimmons, Esq.
DLA PIPER LLP (US)
401 B Street, Suite 1700
San Diego, CA 92101-4297

ATTACHMENT TWO

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 32
1301 Clay St Ste 300N
Oakland, CA 94612-5224

Agency Website: www.nlrb.gov
Telephone: (510)637-3300
Fax: (510)637-3315

Download
NLRB
Mobile App

August 26, 2014

James Chavez
Fry's Electronics
10555 Iona Avenue
Hanford, CA 93230

Re: Fry's Electronics
Case 32-RC-135431

Dear Mr. Chavez:

Enclosed is a copy of a petition that TEAMSTERS LOCAL 517, INTERNATIONAL BROTHERHOOD OF TEAMSTERS filed with the National Labor Relations Board (NLRB) seeking to represent certain of your employees. This letter tells you how to contact the Board agent who will be handling this matter, explains your right to be represented, requests that you provide certain information, notifies you of a hearing, requests that you post notices, and discusses some of our procedures including how to submit documents to the NLRB.

Investigator: This petition will be investigated by Field Examiner HELEN YOON whose telephone number is (510)637-3282. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. If the agent is not available, you may contact Assistant Regional Director CYNTHIA C. RENCE whose telephone number is (510)637-3293.

Immediately upon receipt of the petition, the NLRB conducts an impartial investigation to determine if the NLRB has jurisdiction, if the petition is timely and properly filed, if the showing of interest is adequate, and if there are any other interested parties to the proceeding or other circumstances bearing on the question concerning representation. If appropriate, the NLRB then attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or at the Regional office upon your request.

If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the NLRB. Their knowledge regarding this matter was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Requested Information:

Information Needed Immediately: To process the petition in this matter, we need certain information from you. Accordingly, please submit to this office, as soon as possible, the following information:

(a) The correct name of your organization;

(b) A copy of any existing or recently expired collective-bargaining agreements, and any addenda or extensions, or any recognition agreements covering any of your employees in the unit involved in the petition (the petitioned-for unit);

(c) The name and contact information for any other labor organization (union) claiming to represent any of the employees in the petitioned-for unit;

(d) Your position as to the appropriateness of the petitioned-for unit;

(e) A completed commerce questionnaire (form enclosed) to enable us to determine whether the NLRB has jurisdiction in this matter;

(f) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any; and

(g) An alphabetized list of employees in the petitioned-for unit, with their job classifications, for the payroll period immediately before the date of this petition. This list will be used to resolve possible eligibility and unit questions as well as to determine the adequacy of the Petitioner's showing of interest. If such a list is not submitted promptly, any later submission and request for an evaluation of the Petitioner's showing of interest will be considered untimely and no check of the showing of interest will be conducted absent unusual circumstances.

Information Needed Later: If an election is agreed to or directed in this matter, the Employer must file with this office an alphabetized list of the full names and addresses of all eligible voters. We will then make the list available to all parties to the election. The list must be furnished within 7 days of the direction of, or agreement to, an election. I am advising you of this requirement now, so that you will have ample time to prepare this list.

Notice of Hearing: Enclosed is a Notice of Hearing to be conducted on September 4, 2014 if the parties do not voluntarily agree to an election. If a hearing is necessary, it is expected to run on consecutive days until concluded. The enclosed Form NLRB-4339 provides information about rescheduling the hearing. Requests for postponement of the hearing to a date more than 14 days after the petition was filed will normally not be granted absent extraordinary circumstances.

Posting Notices: The NLRB believes that employees should have information about their rights while a representation petition is pending; and employers and labor organizations should be apprised of their responsibilities to refrain from conduct which could interfere with employees' freedom of choice in an election. Accordingly, please immediately post the enclosed Notice to Employees (Form 5492) in conspicuous places in areas where employees in the

petitioned-for unit work. Additional copies of the Notice to Employees are available for posting if you need them.

Procedures: We strongly urge everyone to submit all documents and other materials (except unfair labor practice charges and representation petitions) by E-Filing (not e-mailing) through our website, www.nlrb.gov. However, the NLRB will continue to accept timely filed paper documents. On all your correspondence regarding the petition, please include the case name and number indicated above.

Information about the NLRB, the procedures we follow in representation cases, and our customer service standards is available on our website, www.nlrb.gov, or from an NLRB office upon your request.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Acting Regional Director

Enclosures

1. Notice of Hearing
2. Notice Regarding Representation Cases (Form 4339)
3. Statement of Standard Procedures in Formal Hearings (Form 4669)
4. Commerce Questionnaire
5. Notice to Employees (Form 5492)
6. Copy of Petition

FORM EXEMPT UNDER 44 U.S.C.

INTERNET FORM NLRB-502 (2-08)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

DO NOT WRITE IN THIS SPACE

Case No.	Date Filed
32-RC-135431	08/26/2014

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1. PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)

- [x] **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] **RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE)** - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- [ ] **UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES)** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [ ] **UC-UNIT CLARIFICATION**- A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) [ ] In unit not previously certified. [ ] In unit previously certified in Case No. _____
- [ ] **AC-AMENDMENT OF CERTIFICATION**- Petitioner seeks amendment of certification issued in Case No. _____ Attach statement describing the specific amendment sought.

2. Name of Employer	Employer Representative to contact	Tel. No.
Fry's Electronics	James Chavez	559-772-3500

3. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)	Fax No.
10555 Iona Avenue, Hanford, CA 93230	866-230-9584

4a. Type of Establishment (Factory, mine, wholesaler, etc.)	4b. Identify principal product or service	Cell No.
Warehouse	Electronic Merchandise	e-Mail

5. Unit involved (In UC petition, describe present bargaining unit and attach description of proposed clarification.)	6a. Number of Employees in Unit:
Included Warehouse employees, forklift drivers, assemblers, pallet jack operators, maintenance, janitorial, shipping clerks, receiving clerks, and non-statutory hourly supervisors.	Present: 70
Excluded Office clericals, guards and supervisors as defined in the Act.	Proposed (By UC/AC)
	6b. Is this petition supported by 30% or more of the employees in the unit?* [x] Yes [ ] No *Not applicable in RM, UD, and AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. [ ] Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about (Date) _____ (If no reply received, so state).

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent (If none, so state.)	Affiliation	
Address	Tel. No.	Date of Recognition or Certification
	Cell No.	Fax No. / e-Mail

9. Expiration Date of Current Contract, If any (Month, Day, Year)	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day and Year)

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes [ ] No [x]	11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of (Insert Name) _____, a labor organization, of (Insert Address) _____ Since (Month, Day, Year) _____

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state)

Name	Address	Tel No.	Fax No.
		Cell No.	e-Mail

13. Full name of party filing petition (If labor organization, give full name, including local name and number)
Teamsters Local 517

14a. Address (street and number, city, state, and ZIP code)	14b. Tel. No. EXT	14c. Fax No.
512 W. Oak Street, Visalia, CA 93291	559-627-9993	559-627-9039
	14d. Cell No.	14e. e-Mail

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (to be filled in when petition is filed by a labor organization)
International Brotherhood of Teamsters

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)	Signature	Title (If any)
John Provost		Attorney

Address (street and number, city, state, and ZIP code)	Tel. No.	Fax No.
Beeson, Tayer & Bodine, 520 Capitol Mall, Suite 300, Sacramento, CA 95814	916-325-2100	916-325-2120
	Cell No.	eMail jprovost@beesontayer.com

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

RECEIVED NLRB REGION 32 2014 AUG 26 AM 8:30

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

FRY'S ELECTRONICS **Employer** **and** **TEAMSTERS LOCAL 517, INTERNATIONAL BROTHERHOOD OF TEAMSTERS** **Petitioner**	**Case 32-RC-135431**

NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at 9:00 a.m. on **Thursday, September 4, 2014,** and on consecutive days thereafter until concluded, at the National Labor Relations Board offices located at 1301 Clay Street, Suite 300N, Oakland, California, a hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony. Form NLRB-4669, *Statement of Standard Procedures in Formal Hearings Held Before The National Labor Relations Board Pursuant to Petitions Filed Under Section 9 of The National Labor Relations Act,* is attached.

Dated: August 26, 2014

Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Acting Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

FORM NLRB 4339
(2-12)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE REGARDING REPRESENTATION CASE HEARINGS

Case 32-RC-135431

Hearing Cancellation Based on Agreement of Parties: The issuance of the Notice of Hearing in this case does not mean that the matter cannot be resolved by agreement of the parties. On the contrary, the NLRB encourages prompt voluntary adjustments. The Board agent assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by me, will cancel the hearing.

Postponement of the Hearing: Postponement of the hearing ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing and be filed with the Regional Director;
(2) Copies of the request must be simultaneously served on all other parties, and that fact must be noted on the request;
(3) Absent extraordinary circumstances, the request must be received no later than 24 hours before the hearing is scheduled to begin;
(4) Requests for postponement of the hearing to a date more than 14 days after the petition was filed will normally not be granted absent extraordinary circumstances;
(5) Grounds must be set forth in ***detail,*** e.g., the unavailability of counsel and all other counsel in the law firm due to previously scheduled federal court or other U.S. Agency hearings or trials;
(6) Alternative dates for any rescheduled hearing must be given; and
(7) The positions of all other parties regarding the postponement and alternative hearing dates must be ascertained in advance by the requesting party and set forth in the request.

Approval of a postponement request may be conditioned upon one or more of the following:

(1) The agreement of all parties to participate at a conference to be held at the Regional Office at least one full day before the rescheduled hearing date;
(2) Agreement by the requestor that extensions of time for filing of briefs will not be sought or granted; and/or
(3) The requestor's execution of stipulations on matters not in dispute, e.g., jurisdiction, labor organization status, appropriate unit.

Consecutive Days of Hearing: Once opened, it is expected the hearing will continue on consecutive business days until concluded.

James Chavez
Fry's Electronics
10555 Iona Avenue
Hanford, CA 93230

John C. Provost, ESQ.
Beeson, Tayer & Bodine, APC
520 Capitol Mall, Suite 300
Sacramento, CA 95814-4714

Chester Suniga, Secretary-Treasurer
Teamsters Local 517, International
Brotherhood Of Teamsters
512 W. Oak Street
Visalia, Ca 93391

Form NLRB 4669
(1-92)

SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD PURSUANT TO PETITIONS FILED UNDER SECTION 9 OF THE NATIONAL LABOR RELATIONS ACT

The hearing will be conducted before a Hearing Officer of the National Labor Relations Board. (R CASES)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues. All parties appearing before this hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, should notify the Regional Director as soon as possible and request the necessary assistance. An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. *(Copies of exhibits should be supplied to the Hearing Officer and other parties at the time the exhibit is offered in evidence.)* After the close of the hearing, one or more of the parties may wish to have corrections made in the record. All such proposed corrections, either by way of stipulation or motion, should be forwarded to the Regional Director or to the Board in Washington *(if the case is transferred to the Board)* instead of to the Hearing Officer, inasmuch as the Hearing Officer has no power to make any rulings in connection with the case after the hearing is closed. All matter that is spoken in the hearing room will be recorded by the official reporter while the hearing is in session. In the event that any party wishes to make off-the-record remarks, requests to make such remarks should be directed to the Hearing Officer and not to the official reporter.

Statements of reasons in support of motions or objections should be as concise as possible. Objections and exceptions may, on appropriate request, be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

All motions shall be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order of relief sought and the grounds for such motion. An original and two copies of written motions shall be filed with the Hearing Officer and a copy thereof immediately shall be served on the other parties to the proceeding.

The sole objective of the Hearing Officer is to ascertain the respective positions of the parties and to obtain a full and complete factual record on which the duties under Section 9 of the National Labor Relations Act may be discharged by the Regional Director of the Board. It may become necessary for the Hearing Officer to ask questions, to call witnesses, and to explore avenues with respect to matters not raised by the parties. The services of the Hearing Officer are equally at the disposal of all parties to the proceedings in developing the material evidence.

At the close of hearing, any party who desires to file a brief may do so in the appropriate manner described below.

1. Briefs filed with the Regional Director

Unless transfer of the case to the Board is announced prior to close of hearing, the brief should be filed in duplicate with the Regional Director. A copy must also be served on each of the other parties and proof of such service must be filed with the Regional Director at the time the briefs are filed. Briefs submitted are to be double-spaced on 8 1/2 by 11 inch paper.

The briefs shall be filed within 7 days after the close of the hearing unless an extension of time, not to exceed an additional 14 days on request made for good cause, before the hearing closes, is granted by the Hearing Officer. Briefs must be filed in accordance with the provisions of Section 102.111 (b) of the Board's Rules. Facsimile transmission of briefs is not permitted.

A request for an extension of time made after the close of the hearing must be received by the Regional Director, in writing, as much in advance of the date the briefs are due as possible and copies thereof must be served on the other parties by the same or faster method as used to file with the Regional Director (see 102.114 of Board's Rules).

2. Briefs filed with the Board in Washington, DC

a. If transfer of case to the Board is announced at the hearing

Should any party desire to file a brief with the Board, eight copies thereof shall be filed with the Board in Washington, DC. Immediately on such filing, a copy shall be served on each of the other parties. Proof of such service must be filed with the Board simultaneously with the briefs. Such brief shall be printed on otherwise legibly duplicated: Provided, however, that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. No reply brief may be filed except on special leave of the Board. *Any brief filed after transfer of the case to the Board shall be double-spaced on 8 1/2 by 11 inch paper.*

The briefs shall be filed within 7 days after the close of hearing unless an extension of time, not to exceed an additional 14 days on request made for good cause, before the hearing closes, is granted by the Hearing Officer. Briefs must be filed in accordance with the provisions of Section 102.111(b) of the Board's Rules. Facsimile transmission of briefs is not permitted.

b. Transfer of cases to the Board effected after close of hearing

Pursuant to Section 102.67 of the Board's Rules, the Regional Director may, at any time after the close of hearing and before decision, transfer a case to the Board for decision. The order transferring the case will fix a date for filing briefs in Washington, DC.

If a brief has already been filed with the Regional Director, the parties may file eight copies of the same brief with the Board in the same manner as set forth in "a," above, except that service on other parties is not required. No further briefs shall be submitted except by special permission of the Board.

If the case is transferred to the Board before the time expires for filing of briefs with the Regional Director and before the parties have filed briefs, such briefs shall be filed as set forth in "a," above.

c. Request for extension of time to file briefs with the Board

A request for an extension of time to file briefs with the Board in Washington, D.C., made after the close of hearing must be received by the Executive Secretary's Office in Washington as much in advance of the date the briefs are due as possible but in any event no later than the close of business on the due date. Such request must be in writing and a copy shall be served immediately on each of the other parties and the Regional Director and shall contain a statement that such service has been made.

As provided in Section 102.114(a) and (e) of the Board's Rules and Regulations, service on all parties of a request for an extension of time shall be made in the same or faster manner as that utilized in filing the paper with the Board; however, when filing with the Board is accomplished by facsimile transmission or by personal service, the other parties shall be promptly notified of such action by facsimile transmission or by telephone, followed by service of a copy personally or by overnight delivery service.

Revised 3/21/2011

NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME	CASE NUMBER
Fry's Electronics	32-RC-135431

1. EXACT LEGAL TYPE OF ENTITY (As filed with State and/or stated in legal documents forming entity)

2. TYPE OF ENTITY

[ ] CORPORATION [ ] LLC [ ] LLP [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP [ ] OTHER (Specify)

3. IF A CORPORATION OR LLC:

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS:

5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR:

6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS (Products handled or manufactured, or nature of services performed):

7. A. PRINCIPAL LOCATION:	B. BRANCH LOCATIONS:

8. NUMBER OF PEOPLE PRESENTLY EMPLOYED:

A. Total:	B. At the address involved in this matter:

9. DURING THE MOST RECENT (Check appropriate box): [ ] CALENDAR YR [ ] 12 MONTHS OR [ ] FISCAL YR (Fy dates:)

	YES	NO
A. Did you **provide services** valued in excess of $50,000 directly to customers outside your State? If no, indicate actual value. $		
B. If you answered no to 9A, did you **provide services** valued in excess of $50,000 to customers in your State who purchased goods valued in excess of $50,000 from directly outside your State? If no, indicate the value of any such services you provided. $		
C. If you answered no to 9A and 9B, did you **provide services** valued in excess of $50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than $50,000, indicate amount. $		
D. Did you **sell goods** valued in excess of $50,000 directly to customers located outside your State? If less than $50,000, indicate amount. $		
E. If you answered no to 9D, did you **sell goods** valued in excess of $50,000 directly to customers located inside your State who purchased other goods valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
F. Did you **purchase and receive goods** valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
G. Did you **purchase and receive goods** valued in excess of $50,000 from enterprises who received the goods directly from points outside your State? If less than $50,000, indicate amount. $		
H. **Gross Revenues** from all sales or performance of services *(Check the largest amount)*: [ ] $100,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 or more If less than $100,000, indicate amount.		
I. **Did you begin operations within the last 12 months?** If yes, specify date: _____		

10. ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?

[ ] YES [ ] NO *(If yes, name and address of association or group).*

11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)*	SIGNATURE	E-MAIL ADDRESS	DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

NOTICE TO EMPLOYEES

FROM THE

National Labor Relations Board

A PETITION has been filed with this Federal agency seeking an election to determine whether certain employees want to be represented by a union.

The case is being investigated and NO DETERMINATION HAS BEEN MADE AT THIS TIME by the National Labor Relations Board. IF an election is held Notices of Election will be posted giving complete details for voting.

It was suggested that your employer post this notice so the National Labor Relations Board could inform you of your basic rights under the National Labor Relations Act.

YOU HAVE THE RIGHT under Federal Law

- **To self-organization**
- **To form, join, or assist labor organizations**
- **To bargain collectively through representatives of your own choosing**
- **To act together for the purposes of collective bargaining or other mutual aid or protection**
- **To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the union's costs of representational activities *(such as collective bargaining, contract administration, and grievance adjustments).***

It is possible that some of you will be voting in an employee representation election as a result of the request for an election having been filed. While NO DETERMINATION HAS BEEN MADE AT THIS TIME, in the event an election is held, the NATIONAL LABOR RELATIONS BOARD wants all eligible voters to be familiar with their rights under the law IF it holds an election.

The Board applies rules that are intended to keep its elections fair and honest and that result in a free choice. If agents of either unions or employers act in such a way as to interfere with your right to a free election, the election can be set aside by the Board. Where appropriate the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

NOTE:

The following are examples of conduct that interfere with the rights of employees and may result in the setting aside of the election.

- **Threatening loss of jobs or benefits by an employer or a union**
- **Promising or granting promotions, pay raises, or other benefits to influence an employee's vote by a party capable of carrying out such promises**
- **An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity**
- **Making campaign speeches to assembled groups of employees on company time within the 24-hour period before the election**
- **Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals**
- **Threatening physical force or violence to employees by a union or an employer to influence their votes**

Please be assured that IF AN ELECTION IS HELD every effort will be made to protect your right to a free choice under the law. Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law. The National Labor Relations Board, as an agency of the United States Government, does not endorse any choice in the election.

NATIONAL LABOR RELATIONS BOARD

an agency of the

UNITED STATES GOVERNMENT

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE

FORM NLRB-5492 (8-95)

GPO: 1994 - 152-750

ATTACHMENT THREE

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

FRY'S ELECTRONICS, INC.

Employer,

and **Case 32-RC-135431**

TEAMSTERS LOCAL 517,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Petitioner.

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Fry's Electronics, Inc., herein called the Employer, is a corporation headquartered in San Jose, California that is engaged in the business of the retail and online sales of consumer electronics and appliances. The Employer operates thirty-four retail stores throughout California and other states as well as a facility in Hanford, California that is the subject of this petition. The International Brotherhood of Teamsters, Local 517, AFL-CIO, herein called the Petitioner or the Union, filed a petition with the National Labor Relations Board under section 9(c) of the National Labor Relations Act seeking to represent a unit of all warehouse employees, forklift drivers, assemblers, pallet jack operators, maintenance, janitorial, shipping clerks, receiving clerks, and non-statutory hourly supervisors employed by the Employer at is facility located at 10555 Iona Ave, Hanford, California; excluding all other employees, office clericals, guards and supervisors as defined in the Act.

A hearing officer of the Board held a hearing on September 8, 2014, at the Region 32 office in Oakland, California, and the parties have filed post-hearing briefs, which I have duly considered. At the hearing, the parties stipulated to the following unit as appropriate under Section 9(b) of the Act: "All hourly employees located at the Employer's facility in Hanford, California; excluding loss prevention officers, and supervisors as defined in the Act."

As evidenced at the hearing and in the briefs, the parties disagree on whether ten hourly supervisors are supervisors within the meaning of Section 2(11) of the Act. The Employer contends that the bargaining unit should exclude the supervisors because they are statutory supervisors under Section 2(11) of the Act. The Petitioner, on the other hand, argues that they are not 2(11) supervisors and should be included in the unit.[1]

I have carefully considered the evidence and the arguments presented by both parties on these issues. As discussed below, I have concluded, in agreement with the Petitioner, that the hourly supervisors are not statutory supervisors and should be included in the unit of employees eligible to vote in the election I am directing herein. Accordingly, I have directed an election in a unit that consists of approximately 100 employees.

I. OVERVIEW OF OPERATIONS

The Employer's business is divided into three districts. The Employer's Hanford, California facility is a large warehouse building with some internal office space which primarily serves to ship and receive merchandise from District 1's eleven retail stores in Northern California, Oregon, Washington and Nevada, in addition to its other retail stores nationwide. The store functions as a point of return for broken, warrantied, over-purchased or undersold goods which are tested and returned to vendors for credit or replacement. Other goods which are

[1] Because the stipulated unit includes all hourly employees, and to avoid any confusion created by the use of the term 'supervisor' as used in the job title of the employees who are the subject of the hearing and 'supervisor' as defined in Section 2(11) of the Act, I shall hereafter refer to these ten employees as "hourly supervisors."

too damaged, not under warranty, or un-returnable for other reasons are sold for scrap or disposed of. Trucks arrive and unload pallets or cages of goods, which are then broken down and the items processed and distributed to their proper departments for testing, inventory and shipping.

In terms of supervisory hierarchy, the facility is overseen by Todd Smith, the District 1 manager whose office is located in San Jose. The Hanford store is headed by store manager, James Chavez, who has overall responsibility for the day-to-day operations of the facility.[2] Directly under the store manager is the assistant store manager, Jesse Agpoon. The record does not contain a description of the work done by Agpoon. The hourly supervisors report to the seven department managers, who in turn report to Agpoon and Chavez.

In terms of organizational structure, the facility is divided into ten departments. There are five basic departments at issue in the case at bar: electronic components, computers, software, audio/video, and appliance/wireless that mirror the departmental organization at the Employer's retail stores. These are the departments in which the hourly supervisors at issue in this hearing work. There is also a service department, a loss prevention department, an archives department and the shipping and receiving department. These latter departments do not have the same hierarchical structure as the other five, and in any case, the parties have stipulated that the three supervisors in those departments are statutory supervisors under the Act.[3]

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[2] Although Chavez has the title store manager, Hanford is not actually a retail store but rather a processing facility.

[3] The Parties stipulated that the following are Section 2(11) supervisors: James Chavez (Store Manager), Ernesto Medrano (SST Shipping Manager), Tom Gaffney (Director of Technical Service), Yemane Zewoldemariam (Audit Manager), Jesse Agpoon (Assistant Store Manager), Joey Williams (ASP Manager), Raymond Ratliff (Loss Prevention & Safety Manager), Bernard Tagavilla (Electronic Components [aka Department 1] Manager), Rusmir Jakirlic (Computer Department [aka Department 2] Manager), Elsabate Biazene (Software [aka Department 3] Manager), Chris Merrill (AIV Department [aka Department 5] Manager), Jorge Macedo (Appliance Wireless [aka Department 7] Manager), Cesario Flores (Receiving Department Manager), and Moeez Ahmad Shipping/Receiving Department [aka Department 11] Manager), Jo Ann Bamberger (Parts Supervisor), Paul Hand (ASP Supervisor), and Paul Box (Archive Supervisor).

Each of the five departments in question has one or two department managers, between one and three hourly supervisors, and four to twenty non-supervisory employees. The non-supervisory employees in each department at issue are non-exempt and hourly, and work either as transition coordinators, processing coordinators, shipping coordinators, or test technicians. The salary range for the hourly nonsupervisory employees starts at nine dollars an hour and goes as high as twelve for the position of test technician. Hourly supervisors' salary ranges from eleven dollars an hour to a maximum of fourteen dollars per hour. The hourly employees and the hourly supervisors receive the same benefits package.

The open area of the warehouse houses all five of the departments under discussion. Each department has its own area, and the hourly supervisor for a given department has a table with a computer. There was no documentary evidence submitted into the record pertaining to the job description of the hourly supervisors, nor did any of the hourly supervisors testify at the hearing. The sole witness for the Employer, Todd Smith, the District 1 manager, stated that their duties are much the same as the department manager. Three witnesses for the Petitioner, all hourly employees, testified that the hourly supervisors spend a great deal of their time calling or emailing with vendors arranging the return of merchandise due to warranty, repair, overstock, or for other reasons. Occasionally, the hourly supervisors help out with the daily work of the coordinators in shipping or processing. They oversee the work of the coordinators and will re-direct the tasks of coordinators if a time-sensitive shipment of merchandise arrives, often based on a communication with the vendor.

II. SECTION 2(11) SUPERVISORY STATUS: HOURLY SUPERVISORS

According to the Employer, the hourly supervisors do much the same job as the department managers do. Such duties include directing work, ensuring job performance meets

managerial expectations, maintaining a positive working environment, addressing safety and other issues of associates, and counseling associates if necessary. There are thirteen hourly supervisors at the Hanford facility, and the Employer considers them to be the first line of management in their respective departments and to act as the conduit of communication to rank and file employees. The Employer and the Petitioner have stipulated that three of these hourly supervisors qualify as Section 2(11) supervisors and should not be included in the bargaining unit.[4] Hourly supervisors, along with department managers, attend weekly video department conferences regarding development and modification of merchandise processing or receiving policies and procedures.

The record does not contain job descriptions for the positions of the hourly supervisors, nor was testimony provided detailing their day-to-day activities. However, based on the testimony of the non-supervisory employees, the primary responsibilities of the hourly shipping supervisors are to communicate with the vendors about the return of merchandise, to oversee the department employees and ensure that the merchandise is properly processed, to communicate management directives to the department employees, and to assist departmental employees in their work. According to the Employer, the hourly supervisors' job functions also include adhering to, monitoring, and reporting facility safety policies. For example, they ensure that the employees operating machinery are properly licensed. The hourly supervisors use the same time

[4]Those supervisors are Jo Ann Bamberger (Parts Supervisor), Paul Hand (ASP Supervisor), and Paul Box (Archive Supervisor). The record evidence is sparse on the differences between these three and the other ten hourly supervisors. District Manger Todd Smith testified that all thirteen hourly supervisors have the same authority. However, there appears to be no department manager for the parts or archive departments in which Bamberger and Box work. Thus, as the Employer concedes on brief, these two individuals have assumed the department manager's authority to schedule, approve time off, direct the work flow and discipline employees in their departments. As such, I decline the Employer's invitation to read into the stipulation regarding Bamberger, Hand, and Box's supervisory status any similar conclusions regarding the supervisory status of the other ten hourly supervisors. Instead, I find that the burden remains on the Employer to prove their 2(11) status.

clock, receive the same benefits and, share the same break room as the non-supervisory employees.

Legal Authority and Analysis

Section 2(11) of the Act defines a supervisor as one who possesses the "authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The burden of proving that an employee is a statutory supervisor is on the party alleging such status. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). There is a three-part test for establishing supervisory status. Employees are statutory if: 1) they hold the authority to engage in any one of the twelve supervisory functions listed in Section 2(11); 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and 3) their authority is held in the interest of the employer. *Id.* In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) the Board clarified the meaning of Section 2(11) criteria "assign," "responsibly direct," and "independent judgment." The Board held that to "assign" means to designate significant overall duties to an employee, and not simply to give an employee ad hoc instructions to perform a particular task. *Id.* at 686, 689. For "direction to be 'responsible' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not properly performed." *Id.* at 691-92. Accordingly, the Board determined that "to establish

accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect for adverse consequences for the putative supervisor if he/she does not take these steps." *Id.* at 692.

To exercise "independent judgment," a putative supervisor "must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Id.* at 692-93. However, "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company rules or policies, the verbal instructions of higher authority, or in the provisions of a collective bargaining agreement." *Id.* at 693. Moreover, the Board has long held that the exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner or through giving some instructions or minor orders to other employees is not sufficient to confer supervisory status. *Chicago Metallic Corp.*, 271 NLRB 1677, 1689 (1985). Furthermore, the Board is careful not to give too broad an interpretation to the statutory term "independent judgment" because supervisory status results in the exclusion of the individual from the protections of the Act. *Tree-Free Fiber Co.*, 328 NLRB 389 (1999); *McGraw-Hill Broadcastings Co.,* 329 NLRB 454, 459 (1999); *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 936 (9th Cir. 1981).

The Employer contends that the hourly supervisors have authority within the meaning of Section 2(11) of the Act to discipline or effectively recommend discipline, including suspension and termination, to effectively recommend promotions, to effectively recommend hiring decisions, to adjust grievances, to responsibly direct employees, and to assign work. Although the parties did not stipulate that the hourly supervisors do not possess the authority to layoff,

recall, or reward, the Employer does not argue on brief, nor does the record show, that they have such authority.

1. The Nature of the Employer's Record Testimony

The only witness called by the Employer at the hearing was District Manager Todd Smith. On brief, the Employer argues that "Smith provided reliable testimony at the hearing based on his extensive knowledge of the Employer's policies and procedures, first-hand observations at Hanford, and what has been reported to him in the normal course and scope of his job duties." However, I note that although Smith has worked for the Employer for over 20 years, the bulk of his experience was in the Employer's retail stores and he has never actually worked at the Hanford facility that is the subject of this petition. Moreover, there was little record evidence establishing that he has any significant interaction with hourly supervisors on his infrequent visits to the shop floor other than briefly observing operations. As such, most of his knowledge of the hourly supervisors' actual job duties comes from second-hand reports from store manager Chavez, who did not testify at the hearing. While hearsay evidence is admissible in representation hearings, it is of less probative value than direct first-hand testimony. Recognizing this fact, near the end of the hearing, the Hearing Officer specifically requested that the Employer call as witnesses one or more of the hourly supervisors at issue here. The Employer declined this invitation.

As a result, much of the evidence it relies upon is vague and conclusory hearsay testimony from Smith. As such, I note that it is well established that the "party asserting that an individual has supervisory authority has the burden of proof. *NLRB v. Kentucky River Community Care*, infra at 713; *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003). "[W]henever the evidence is in conflict or otherwise inconclusive on a particular indicia of

supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center,* 295 NLRB 486, 490 (1989); see also *Brusco Tug & Barge, Inc.,* 359 NLRB No. 43 (2012). Purely conclusory evidence is not sufficient to establish supervisory status; rather the party must present evidence that the employee actually possesses the Section 2(11) authority at issue. *Alternate Concepts, Inc.*, 358 NLRB No. 38 slip op. at 3 (2012)("[M]ere inferences or conclusory statements, without detailed, specific evidence are insufficient to establish supervisory authority."). Therefore, to the extent that the Employer seeks to rely herein on vague or conclusory testimony from Smith to establish supervisory status, I will take into account the Board's caution as to the weight to be given this testimony.

2. Authority to Discipline

The Employer asserts that the hourly supervisors have the authority to initiate and effectively recommend discipline. According to District Manager Smith, if there is an issue with one of the coordinators or technicians in their department, the hourly supervisor will speak with the employee about that issue. He referred to this as verbal counseling. (Verbal counseling is listed as the first form of discipline in the Employer's Handbook.) If such discussion does not resolve the issue, the supervisor will either bring the problem to their department manager or to store manager James Chavez or assistant store manager Jesse Agpoon. The record does not show that the hourly supervisor then recommends further discipline to a higher authority, but rather that she merely reports the problem and the fact that the employee had been verbally counseled about the matter. Although Smith testified that verbal counseling is more formal that merely talking to an employee about a problem because a written form may be placed in the employees file, no evidence was introduced into the record to show that any supervisor who

engages in a verbal counseling has actually then submitted a written record of that conversation into an employee's personnel file. To the contrary, the record contains an example where a verbal counseling issued by an hourly supervisor to employee Charisse Prude was not put into her file after the store manager reviewed the incident. The next step, ostensibly, is that the department manger and/or Chavez will meet with the employee and possibly the hourly supervisor to discuss the matter. Subsequent progressive discipline may flow from this meeting, or the matter may be resolved.

Smith testified to several specific hourly supervisors being involved in the discipline of associates or coordinators. However, as noted above, Smith's knowledge of such involvement was based entirely upon information communicated to him by Chavez, who reports to Smith, but who did not testify himself. With regard to the hourly supervisors at issue, Smith testified that he was unaware of any discipline initiated by computer processing hourly supervisor Roy Jeffers, though he stated that Jeffers sat in on a disciplinary meeting with employee John Grigsby. Smith then said that he did not know how Jeffers was involved, which meeting he sat in on, or what occurred during the meeting, only that Jeffers had witnessed some things.

Smith testified that electronic components processing hourly supervisor Danny Rider also sat in on the meeting with employee Grigsby, though Rider's role in the meeting was not specified. Smith also recalled that Rider had signed a disciplinary form pertaining to attendance issues with an employee Robert Herr. However, Smith did not testify in what capacity Rider had signed the form. He said that Chavez had emailed it to him and that he had forwarded it to Employer's counsel for purposes of this hearing, however the form was not introduced into evidence nor was it produced at the hearing.

Smith stated that he was informed by Chavez that computer shipping hourly supervisor Samantha Jordan had counseled employee Charisse Prude for insubordination. He testified that he was told by Chavez that Jordan drafted a counseling form, though after discussion with Prude, it was determined by Chavez that no written discipline would issue and nothing was placed in her file. Smith did not testify to anything further about the counseling form, what it said, what instructions were given regarding its creation, or what impact, if any, it had on Prude's terms and conditions of employment. It was not produced at the hearing.

Smith testified that he was informed by Chavez that electronic components shipping hourly supervisor Estella Bustos had verbally counseled coordinator Eric Ramirez over attendance and attitude issues and she then sat in on a meeting with Ramirez and her department manager Bernard Tagavilla. However, no disciplinary form was created, and there was again no evidence that this verbal counseling had any impact on Ramirez's terms and conditions of employment. Smith also said that Chavez told him that Bustos had counseled associate Jessica Rodriguez about a dress code violation. Again no disciplinary form was created. No documentary evidence regarding this discipline was produced for the hearing, nor was any testimony provided detailing the substance of the counselings or the meeting or what role Bustos played in the meeting.

Smith testified that computer shipping hourly supervisor Gina Ramirez verbally counseled coordinator Colby Olvis for tardiness. However, Smith did not know when this occurred, nor was he aware of any further discipline regarding Olvis. He also did not testify as to the substance of the counseling, nor was a copy of the counseling form offered into evidence at the hearing.

Smith also testified that software shipping hourly supervisor Rosa Pizarro verbally counsels associates all the time, and that she recently verbally counseled associate Zach Fullerton for taking excessive breaks. Fullerton was ultimately suspended for a period of time. However, Smith did not testify as to the substance of Pizarro's counseling, or how, if at all, Pizarro was involved in the decision to suspend Fullerton. Although there is a disciplinary form that would normally be used, Smith did not see or produce the form at the hearing or know whether or not Pizarro signed the form. Pizarro is currently the acting department manager, while her manager, Elsa, is out on maternity leave. This has been the scenario for approximately three months, and it has not yet been determined when Elsa will return. Pizzaro spoke with Fullerton in her capacity as acting department manager rather than in her capacity as an hourly supervisor when she verbally counseled him. Her authority as acting department manger is examined in further detail below.

As far as hourly supervisors Desiree Mares, Jose Ochoa, Iris Jackson, and Jose Murga, Smith did not testify to any involvement by them in disciplinary matters, though he stated that he expected that they would counsel employees and be involved in disciplinary meetings as needed.

On brief, the Employer asserts that the above-detailed evidence establishes that the hourly supervisors have the authority to discipline employees and effectively recommend discipline within the meaning of Section 2(11) of the Act. However, as noted above, in support of this conclusion, the Employer has only proffered examples of hourly supervisors who issued verbal counselings to hourly employees. There was absolutely no testimony as to the content of these verbal warnings, and there was no evidence introduced that these counselings ever went into an employee's file. Moreover, this sparse evidence is further weakened by Smith's admission that he had no first-hand knowledge of supervisors participating in disciplinary

proceedings, and that his testimony was based solely on second-hand information relayed to him by store manager Chavez. Although Smith testified that he asked Chavez for disciplinary records, no disciplinary forms were submitted into the record and no testimony was offered that these counselings laid the foundation for further progressive discipline. While Smith provided several examples of the times when hourly supervisors sat in on disciplinary meetings with their department managers or with Chavez, no testimony was offered as to the substance of these meetings, whether the hourly supervisors made any recommendations at all vis-a-vis further discipline, in what capacity the hourly supervisors attended the meetings (in the case of employee Grigsby it appears that Jeffers was acting as a witness), or whether Chavez conducted an independent investigation prior to issuing further discipline. In no instances were any standard disciplinary forms introduced into the record, even though Smith testified that he had asked Chavez to produce any relevant disciplinary documents, and in one case even forwarded one to the Employer's attorney. The record establishes that in one case, that of employee Charisse Prude, no discipline was issued after Chavez discussed the matter with her. Finally, in no instance was evidence offered to show that a verbal counseling issued by an hourly supervisor affected an employee's terms and conditions of employment.

The Board has recognized that the authority to issue minor corrective actions, such as verbal and written warnings, is too minor a disciplinary function to confer supervisory status when there is no evidence that the warnings form the basis for further discipline or otherwise effect job status. See *Ohio Masonic Homes, Inc.*, 295 NLRB 390, 393-94 (1989); *Passavant Health Center*, 284 NLRB 887, 889 (1987); *Hydro Conduit Corporation*, 254 NLRB 433, 437 (1981)(absent some showing of effect on an employee's job status, "verbal reprimands do not constitute discipline within the meaning of Section 2(11) of the Act"); *Board of Social Ministry,*

327 NLRB 257 (1998). Applying this legal standard to the record facts, I therefore find that the evidence presented by the Employer is insufficient to meet its burden of proving that the hourly supervisors have the authority to discipline or effectively recommend the discipline of unit employees.[5]

3. Authority to Suspend and Fire

The Employer concedes that the hourly supervisors do not have the authority to suspend or terminate employees on their own. However, it contends that the hourly supervisors possess the authority to effectively recommend subordinate employees be suspended or terminated. But the record evidence does not bear out this assertion. Smith testified that because hourly supervisors engage in verbal counselings or warnings, their perspective in the termination process is relied upon by the store manager. Such conclusory statements, in the absence of concrete, detailed examples, are insufficient to support a finding of supervisory status. No instances of an employee being terminated were submitted into the record, let alone any examples of an hourly supervisor's role in offering her perspective on that termination. In the only instance where the record indicates that a verbal counseling led to further discipline, that of Zach Fullerton, no specific testimony was given as to hourly supervisor Rosa Pizarro's involvement in the ultimate decision to suspend Fullerton. I further note that Fullerton was

[5] The Employer's reliance on *Berthold Nursing Care Center, Inc.*, 351 NLRB 27 (2007)) and *Mountaineer Park, Inc.*,343 NLRB 1473 (2004) is misplaced. In *Berthold*, the Board found that LPNs have the authority to complete counseling forms which lay the foundation for further discipline; and effectively recommend discipline against employees, where the recommendation is accepted without further independent investigation. In *Mountaineer Park*, the Board found two housekeepers effectively recommended discipline where they had the authority to bring employee misconduct to the director's attention; write recommendations concerning what level of discipline they considered appropriate without any independent investigation by the director; and the director routinely signed off on the recommendations. In both cases, unlike here, there was sufficient evidence that the Employer followed the putative supervisors' disciplinary recommendations without any independent investigation. By contrast, in the instant case, the record is completely lacking evidence showing supervisors recommending discipline, the process by which verbal counseling lays the foundation for further discipline, whether Chavez or a department manager conducts an independent investigation prior to issuing discipline (which seems to be the case), what role an hourly supervisor plays in disciplinary meetings, or of a disciplinary meeting taking place without Chavez or a department manager present.

counseled and suspended while Pizarro was acting as his department manager, not as his hourly supervisor. Absent any showing that the store manager relies upon the recommendation of an hourly supervisor to suspend or terminate an employee without conducting an independent investigation, I must find that the hourly supervisors do not have the authority to effectively recommend the suspension or termination of an employee within the meaning of Section 2(11). See *Vencor Hospital-Los Angeles,* 328 NLRB 1136 (1999).

4. Authority to Hire

The Employer contends that the hourly supervisors have the authority to participate in the hiring process. However, the record is sparse in this regard, and consisted only of Smith's conclusory testimony that although hiring needs at the Hanford facility have been limited, hourly supervisors have the authority to screen applications and identify viable candidates, to conduct interviews of potential employees, and to recommend individuals for hiring. The Employer refers to this as "meaningful participation," in the hiring process and Smith said that hourly supervisors are considered part of the "Hiring Committee."

However, the record is completely devoid of any concrete evidence of the hourly supervisors in question actually participating in the hiring process, let alone in a way that could be characterized as meaningful. The Petitioner's two employee witnesses who testified as to their own hiring processes asserted that they were interviewed and hired by Chavez, and not by an hourly supervisor. Moreover, Smith did not testify about any meetings in which a decision was made to either hire or transfer an employee and at which an hourly supervisor was present. No testimony was given tending to show that hourly supervisors of their own initiative review applications or conduct interviews of prospective employees.

I find that the above evidence does not meet the Employer's burden of establishing supervisory status. The testimony contains no specific examples, details, or circumstances of hourly supervisors engaged in the hiring process. See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006)(recognizing that "purely conclusory evidence is not sufficient to establish supervisory status," and pointing out that the Board "requires evidence that the employee actually possesses the Section 2(11) authority at issue"); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995)(conclusory statements without supporting evidence do not establish supervisory authority); *Sears Roebuck & Co.*, 304 NLRB 193, 193 (1991)(same). On these facts, I find that the Employer has failed to meet its burden of establishing that the hourly supervisors have the authority to hire or to effectively recommend the hiring of an individual. Although Smith testified that hourly supervisors have the authority to meaningfully participate in the hiring process, the record contains no evidence of this ever having taking place. Even if the record did reflect hourly supervisors participating in recommending an individual for employment, there is no evidence to suggest that such a recommendation would be effective, that is would be more than merely taken into consideration. There "must be a more-than-merely-paper showing" that such authority exists. *Golden Crest Healthcare,* 348 NLRB 727, 731 (2006).[6]

On brief, in tacit recognition of the paucity of its evidence, the Employer argues that the Petitioner has failed to rebut its evidence that the supervisors possess such authority, and, therefore, concedes the point. However, the Employer's argument ignores its burden in this regard. The burden is on the Employer as the party asserting supervisory status, not on the

[6] Absent additional evidence, an individual does not effectively recommend hiring where acknowledged supervisors also interview the candidates. *See J. C. Penney Corp.*, 347 NLRB 127, 128-129 (2006) (training supervisor did not effectively recommend hiring where all applicants "recommended" by the training supervisor were subsequently interviewed by other managers, who were the only individuals vested with hiring authority); *Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1387 fn. 9, 1388 (1998) (technicians-in-charge who interviewed candidates and offered "opinions or recommendations" that were given "significant" weight did not have authority to effectively recommend hiring where a higher-level official also participated in the interview and hiring process).

Union. *Kentucky River Community Care, supra.* Therefore, I find that the Employer has failed to meet its burden of proving that the hourly supervisors have the authority to hire or effectively recommend the hiring of employees.

5. The Authority to Promote and Transfer

The Employer concedes that the hourly supervisors do not have the authority to promote or transfer employees on their own. However, it contends that the hourly supervisors possess the authority to effectively recommend subordinate employees for promotion or transfer. The record reflects that the process for promotion would involve an hourly supervisor noticing an employee's good performance and relating that performance to the department manger.[7] The department manager would then speak with the store manager. In order for an employee to be promoted or transferred, a payroll request form would have to be processed. The department manager, the store manager, and district department manager, but not the hourly supervisor, would all have to sign off on this form.

In support of the Employer's effective recommendation assertion, Smith testified that hourly supervisor Rosa Pizarro identified a well-performing employee in the processing area and recommended him to Chavez for a promotion to software test technician. However, Smith stated that he did not know the employee's old wage rate, nor what the new wage rate would be, only that he was relatively positive that the new position would involve a raise. Similarly, Smith identified Estella Bustos as another example of an hourly supervisor who had recommended an employee in her department for promotion. Smith did not know what the new position would be only that it would involve a raise. However, other than these bare facts, the record contains no

[7] I note here that Smith did not testify that hourly supervisors are specifically charged with identifying promising employees to recommend for promotion. Rather, he merely testified that if an hourly supervisor noticed exceptional performance from one of her subordinate employees, she would report that to the department manager. It was not clear whether such a report could potentially result in other benefits, such as a promotion or a bonus.

evidence about whether these two recommendations were solicited from the hourly supervisors, what the hourly supervisors actually said, who the hourly supervisors spoke to, or whether the "recommendations" for promotion were followed. Smith did not testify as to whether the store manager conducted his own independent investigation before deciding to promote the employees, nor did he testify as to what constitutes a recommendation for promotion or how often a recommendation for promotion is followed.

In order for a recommendation for promotion to be effective under the Act, the Board examines the extent to which a promotion decision relies on the recommendation. *Mountaineer Park, Inc.*, 343 NLRB 1473, 1476 (2004). If a recommendation is always followed, or followed in the vast majority of cases without independent investigation, it is deemed effective. By contrast, if a promotion recommendation is not always followed, or if higher management does its own independent evaluation or investigation, a putative supervisor's promotion recommendation is not "effective." *Id.*; see also *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). In examining the issue in the case before me, I find that there is simply insufficient evidence to establish that the hourly supervisors have the authority to promote employees or effectively recommend their promotion.

On brief, the Employer also asserts that the hourly supervisors have the authority to effectively recommend the transfer of employees. In support of this assertion, however, the Employer offers solely the testimony of Smith that the department managers rely upon their transfer recommendations because the hourly supervisors manage and observe the employees daily performances. However, other than this single conclusory statement, the Employer failed to introduce any specific evidence of any employee who was transferred and what role, if any, that an hourly supervisor played in this transfer. As such, I find that the Employer has offered

insufficient evidence to establish that the hourly supervisors have the authority to effectively recommend the transfer of another employee within the meaning of Section 2(11) using independent judgment.

6. Authority to Adjust Grievances

The Employer next contends that the hourly supervisors possess the authority to adjust employee grievances. However, in support of this conclusion, the Employer did not proffer any concrete examples of any grievances that an hourly supervisor has actually adjusted. Instead, it relied solely on the testimony of Smith, and its one exhibit, the Employee Handbook, which states that employees are encouraged to report issues to their supervisor, who will then take reasonable measures to resolve the issue. There are no specific examples in the record of any complaints, disputes, or grievances handled by an hourly supervisor or how the supervisor resolved them. The record also does not indicate what kind of complaints an hourly supervisory has the authority to resolve and what must be reported to a department manager. Nor was any evidence introduced tending to show what action an hourly supervisor would take upon the receipt of an employee complaint.[8]

The Employer also asserted generally that the hourly supervisors have the responsibility to ensure a safe work environment and to address sexual harassment problems. However, once again the Employer failed to flesh out this conclusory testimony with any specific, detailed examples. This was literally the extent of the record evidence offered to demonstrate that the hourly supervisors possess the authority to adjust employee grievances.

On brief, perhaps in recognition of the dearth of record facts on the hourly supervisors' authority to adjust employee grievances, the Employer repeats the same legal argument that I

[8] Even if they had the power to resolve minor grievances and personality conflicts, the Board has held that this does not establish supervisory status. See *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *Ken-Crest Services*, 335 NLRB 777 (2001).

have rejected elsewhere in this decision—the position that the proffer of such vague and conclusory testimony was sufficient to shift the burden to the Petitioner to rebut this evidence. Contrary to the Employer's argument, the burden of proof to establish supervisory status always remains with the party asserting it. The Employer's vague and conclusory testimony, along with policies printed in an employee handbook, was simply insufficient to meet its burden, which means that the Petitioner was under no obligation to offer any evidence to rebut it.[9]

As such, I find that the bare assertion that hourly supervisors possess the authority to adjust grievances is insufficient to confer supervisory status under Section 2(11). Therefore, I find that the Employer has failed to meet its evidentiary burden of showing that hourly supervisors possess the authority to adjust grievances.

7. Authority to Assign and Responsibly Direct Work

The Employer asserts that hourly supervisors possess the authority to direct, assign and review non-supervisory employees' daily tasks and workflow, utilizing independent judgment. I will first address the claim of responsible direction.

In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006), the Board explained that the authority to instruct employees on what work needs to be done and who will do it is not supervisory unless it is also done responsibly, i.e., if the putative supervisor is held accountable for the performance of other employees. To establish accountability, the party asserting supervisory status has to show both that the putative supervisor has "the authority to take corrective action" and can potentially receive "adverse consequences" for the performance errors

[9] See *Lucky Cab Company*, 360 N.L.R.B. No. 43 at 3 (2014)(Board found that despite the fact that employee handbook gave road supervisors the authority to discipline, the road supervisors were not supervisors within the meaning of Section 2(11) because no evidence was presented showing that they exercised this authority: "We reject, therefore, the judge's reliance on the "paper authority" set forth in the handbook, in light of the contrary evidence of the road supervisors' actual practice. *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265 (2d Cir. 2000), enfg. in relevant part 327 NLRB 253 (1998) (no authority to discipline, despite statement in job description, where the alleged supervisors did not actually discipline or recommend discipline)."

of other employees. *Id.* at 691-92. For the adverse consequences to establish "responsible direction," the consequences must flow from the other employees' performance failures, not from the purported supervisor's own performance failure. Finally the putative supervisor must also exercise independent judgment in responsibly directing the work under her.

Applying this standard to the case before me, I find that the evidence in the record fails to demonstrate that the hourly supervisors are held accountable for the performance errors of the coordinators, technicians and associates. For example, no evidence was introduced into the record showing how hourly supervisors are evaluated, or to what extent the performance of their subordinate employees affects their evaluation. Although Smith testified in a conclusory manner that hourly supervisors, like department managers, are held responsible for the overall performance of their departments, and are subject to discipline if it is not being run well and corrections are not made, he failed to provide any specific evidence or facts to support this conclusion. For example, no evidence was introduced to explain how such a departmental evaluation is made, or what criteria are used to evaluate overall performance. Nor were any examples provided of either a department manager or hourly supervisor ever receiving discipline for a negative performance evaluation. Furthermore the record fails to show whether the hourly supervisors are accountable solely for their own work, i.e., their own failures and errors, versus those of their subordinate employees. See *Entergy Mississippi, Inc.*, 357 NLRB No. 178, slip op. at 8-9 (2011). Therefore, Smith's conclusory testimony is insufficient to demonstrate that the Employer holds the hourly supervisors accountable for the poor performance of the coordinators, technicians, or associates. Accordingly, I find that the Employer has presented insufficient evidence to meet its burden to establish that hourly supervisors responsibly direct the work of employees using independent judgment.

The Employer next contends that the hourly supervisors have the authority to direct, prioritize, and assign work, using independent judgment. In support of this conclusion, the Employer relies on the hourly supervisors' authority to assign work tasks to coordinators, technicians, and associates, and to ensure that those employees complete certain tasks on time; their authority to prioritize the tasks of their subordinate employees; their authority to require employees to stay late to complete work assignments; their authority to act as department managers for up to several hours per day; their authority to assist department managers with drafting schedules; and their authority to modify employee schedules.

In *Oakwood,* supra, 348 NLRB at 689, the Board defined "assign" as the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or an overtime period), or giving significant overall duties to an employee, and not simply to give an employee ad hoc instructions to perform a particular task. Choosing the order in which an employee will perform "discrete tasks within [the supervisory] assignment" does not demonstrate the authority to assign under Section 2(11). *Id.* As stated above, the authority to assign must be exercised using independent judgment and must rise above the level of the "routine or clerical." *Id.* at 693.

Applying this test to the facts before me, although there is evidence that the hourly supervisors direct the order of discrete tasks based on priority, send employees home when sick, and assess the need for overtime based on workload fluctuations, I do not find that these assignments meet the standards set forth in *Oakwood,* nor do they require the requisite degree of independent judgment called for by Section 2(11) of the Act to support a finding of supervisory status. In this regard, I note that Smith only generally asserted that hourly supervisors have the authority to direct the work of non-supervisory employees. By contrast, both employees Eddie

Malvo and Prudencio Satumbaga testified that their daily workflow is obvious when they arrive at the facility, and that most employees are relatively self-sufficient and receive scant direction from anyone, including hourly supervisors.

Smith further testified that hourly supervisors have the authority to direct the priority of work assignments for non-supervisory employees. This will occur if an unexpectedly large shipment arrives or a certain shipment is subject to the time constraints of a vendor agreement or a shipping timetable. However, no evidence was offered to demonstrate that such prioritizing is differentiable from the ad hoc instructions or the ordering of discrete tasks cited in *Oakwood*.[10] Moreover, Satumbaga and Malvo each testified that the work is routine enough in nature that it is relatively obvious when work priorities need to shift to get something out the door or another employee needs assistance processing a large load. Even Smith admitted that the work for the day is fairly evident, and that trucks arrive on a pretty regular schedule. As such, the record fails to evince that the hourly supervisors' authority to prioritize certain work is anything more than routine because nothing in the record supports a finding that such employee assignments are based on anything more than common knowledge of the workplace. See *Armstrong Machine Co.*, 343 NLRB 1149, 1150 (2004).

The same may be said for the adjustment of schedules. Smith, as well as the non-supervisory employees, testified that vacation requests are submitted to the department or store manager, and if one does come to an hourly supervisor, she may not sign off on it without approval from the department manager. Smith did testify that hourly supervisors possess the

[10] Here, the Employer's reliance on *Oakwood*, supra, 348 NLRB 686 (2006) is misplaced. The record in this case does not reflect, as the Employer contends, that hourly supervisors decide "what job shall be undertaken next or who shall do it." Rather, if anything, it shows that hourly supervisors do not provide overall assignments, but instead shows that they may direct the order in which an employee performs discrete tasks within those assignments. Testing a certain vendor's products before others or breaking down and processing a particular shipment ahead of others fits this latter description and aligns with the only examples provided of hourly supervisors "assigning" work.

authority to send sick employees home, though the employee would likely speak to the department manager if she were around. However, dismissing a sick employee from work hardly requires the use of independent judgment required by *Oakwood*.[11] And although an employee contacts his hourly supervisor if he is going to be out sick, Smith testified that the hourly supervisor's first step would then be to report the absence to the department manager. Smith also testified that the department managers write the schedules, but that hourly supervisors may help. He stated that hourly supervisor Pizarro writes the schedule for the software department; however, at the time she did this, Pizarro was acting as the department manager (see discussion infra). Smith also admitted that store manager Chavez has final approval over all of the scheduling. Smith further conceded that hourly supervisors do not have the authority to alter the weekly schedule without approval. Finally, Smith admitted that if, based on the amount of work to be done, an hourly supervisor thought it would be necessary for some employees to stay late, they would have to speak with their department manager, who would then speak to the store manager to get final approval. Again, the record fails to demonstrate that hourly supervisors use the requisite independent judgment or possess the requisite authority to assign work under the meaning of Section 2(11) of the Act. As such, this case is akin to *Brusco Tug and Barge*, 359 N.L.R.B. No. 43 (2012), in which the Board affirmed a Regional Director's finding that a group of tugboat mates were not statutory supervisors.

8. Substitution for Department Managers

The Employer argues that the hourly supervisors possess Section 2(11) authority because they routinely undertake the duties and responsibilities of the department managers in their

[11] See, e.g., *Azusa Ranch Market*, 321 NLRB 811 (1996) (employee not found to be a supervisor despite his authority to "decide on his own" to send an employee home for the day because such a decision did not require the use of independent judgment); *Washington Nursing Home*, 321 NLRB 366 (1996) (no supervisory status found where authority to send home employees who were impaired by substance abuse was circumscribed and did not involve the exercise of independent judgment).

absence. In this regard, it is uncontested that hourly supervisors are often present, sometimes on a daily basis, for up to several hours in their department in the absence of their department manger. This is the case because, although everyone at the facility works a day shift, hourly supervisors may either arrive earlier or depart later than their department manager. Smith testified that hourly supervisors regularly act in the capacity of department managers given that they arrive up to two hours earlier than the department manager, remain in the department while the department managers handle work throughout the facility, and continue work after the department managers leave for the day. Based on this evidence, the Employer claims that hourly supervisors are interchangeable with department managers, and thus possess Section 2(11) supervisory authority.

It is true that where an employee completely takes over the supervisory duties of another, he is regarded as a supervisor under the Act. *Birmingham Fabricating Co.*, 140 NLRB 640 (1963). However, the nature of the testimony on this point was vague and highly conclusory. No specific evidence was introduced into the record showing, in those hours of their morning or evening when the department managers are absent, which of their duties, if any, the hourly supervisors assume. To the contrary, non-supervisory employee Malvo testified that his hourly supervisor, Jose Ochoa, does the exact same work whether his department manager is present or not, and non-supervisory employee Satumbaga testified that when his department manager was absent, his hourly supervisor was still required to get approval for shipping protocols, return of merchandise requests, and which vendors needed to be contacted. More importantly, there was no record testimony that during the times when the department managers are absent, the hourly

supervisors take over any authority that they have to exercise any other Section 2(11) authority, such as the authority to discipline, reward, transfer, promote, or adjust grievances. [12]

As such, I find that the instant case falls into the line of cases in which the Board has held that merely being "in charge" of a store regularly on the weekends, or other periods when the admitted supervisor was absent, was not sufficient to establish supervisory authority in the absence of evidence of the use of independent judgment.[13] Accordingly, I find the evidence insufficient to establish that hourly supervisors are given full supervisory authority during the time when the department manager is not present in the department.

Finally, even if the other hourly supervisors are not found to possess Section 2(11) authority, the Employer contends that Rosa Pizarro is a statutory supervisor because she has taken over for Elsa, the software department manager during the past three months while Elsa has been out on maternity leave. I also note that the Employer argues that this scenario shows that all hourly supervisors could potentially step into the role of department manager if necessary. However, once again the Employer has failed to proffer specific, detailed evidence that Pizarro's job duties changed as a result of this substitution or that, in particular, she has now

[12] The Employer's reliance on *Aladdin Hotel*, 270 NLRB 838 (1984)(substitute boxmen and floormen were found be supervisors where it was shown they performed all of the exact same duties as the 2(11) supervisors for whom they were substituting); *Honda of San Diego*, 254 NLRB 1248 (1981)(employee who performed duties of supervisor 10 hours per week found to be a statutory supervisor); and *Rhode Island Hospital*, 313 NLRB 343 (1993)(lead printer found to be statutory supervisor because he makes effective recommendations) is misplaced. While the substitution must be "regular and substantial" that alone is not sufficient to confer supervisory status. The appropriate test for determining the status of employees who substitute for supervisors is whether the part-time supervisors spend a regular and substantial portion of their working time performing supervisory tasks. *Honda of San Diego*, 254 NLRB 1248 (1981). Thus, in *Honda*, where an employee substituted regularly for the service department manager 10 of his 40 working hours each week, and possessed full supervisory authority during those 10 hours, the substitute supervisor was held to be a statutory supervisor. Likewise, in *Doctors' Hospital of Modesto*, 183 NLRB 950 (1970), the Board determined that relief head nurses who regularly substituted for floor head nurses 2 days per week would have been excluded as supervisors had they also possessed supervisory authority while substituting. In the case cited by the Employer, *Rhode Island Hospital*, supra, the lead printer was found to be a Section 2(11) supervisor because of his authority to effectively recommend raises and not because of his substitution.

[13] See, e.g. *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003)(Board found that while the maintenance manager had keys to the store and closed five nights a week, it was evidence only that he was trustworthy, not that he was a statutory supervisor); see also *Talmadge Park, Inc.*, 351 NLRB 1241, 1245 (2007)(Board found that employee who substituted for a supervisor on weekends was not a Section 2(11) supervisor where there was no evidence that she had more authority or exercised independent judgment during those periods).

been given some Section 2(11) authority. Moreover, the Employer has not attempted to argue that this substitution will be regular and ongoing. Rather, this substitution is the result of a maternity leave. In *St. Francis Medical Center-West*, 323 NLRB 1046 (1997), the Board found that substitution for a substantial period of time (5 of the 10 months before the election) was not regular because it was caused by extraordinary circumstances and not likely to recur. As a result, the Board found that the substitute was not a statutory supervisor. In the instant case, the Employer has not attempted to argue that the department manager's maternity leaves will constitute a regular occurrence, nor has it shown that there are other regular and substantial absences during which an hourly supervisor will substitute as a department manager. Thus, even if it were shown that Pizarro possessed the requisite supervisory authority as a substitute department manager (which is not the case here), I would still find that the substitution was of a sporadic nature and unlikely to recur on a regular basis. See also *Jackel Motors,* 288 NLRB 730 (1988). Therefore, I find that the Employer has failed to meet its evidentiary burden in showing that hourly supervisors substitute for department managers on a regular and substantial basis or do so with the requisite supervisory authority under Section 2(11) of the Act.

9. Secondary Indicia of Supervisory Status

Nonstatutory indicia can be used as background evidence on the question of supervisory status, but are not themselves dispositive on the issue in the absence of evidence indicating the existence of one or more of the primary indicia. See *Training School of Vineland*, 332 NLRB 1412 (2000). Because I have concluded, supra, that the shift supervisors do not possess any of the Section 2(11) indicia, an analysis of these secondary indicia is unnecessary.[14] See *Ken-Crest*

[14] Although secondary indicia are not dispositive of supervisory status, I note that the evidence on this point that was proffered at the hearing was insufficient to alter my conclusion herein that the hourly supervisors are not Section 2(11) supervisors. In this regard, there was some testimony at the hearing regarding the hourly supervisors' higher compensation, the fact that they receive sexual harassment training, and the fact that they monitor their departments

Services, 335 NLRB 777, 779 (2001)(in the absence of evidence indicating the existence of one or more of the primary indicia of supervisory status enumerated in Section 2(11), "secondary indicia are insufficient by themselves to establish supervisory status").

In sum, for all of the reasons discussed above, I find that the Employer has failed to meet its burden to establish that the hourly supervisors are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I will include the hourly supervisors in the unit of employees eligible to vote in the election I am directing herein.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion about, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

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for potential safety hazards. Regarding their compensation, although the Employer argues that the hourly supervisors make two dollars more per hour than a non-supervisory employee, this difference is minimal given that a technician at the top of her wage scale could be making more than her hourly supervisor at the bottom of their wage scale. Additionally, although some testimony was provided showing that hourly supervisors receive sexual harassment training and attend weekly meetings with all non-supervisory personnel, no further evidence was submitted tending to show how this contributed to Section 2(11) supervisory status. It is not in dispute that these hourly supervisors have subordinate employees. It is thus in the interest of the Employer that they not harass those employees and that any communications with those employees are in line with the policies and priorities of the Employer. With respect to hourly supervisors acting as the first recipient for potential safety complaints, I note that unit employee Malvo testified that he was on the safety committee for the facility, and also helped to monitor and report safety incidents at the Hanford location across multiple departments. In this capacity, he testified that if he came across a safety issue he could not resolve, he would bring it to Ray, a department manager, not to an hourly supervisor. Finally, I note that the ratio of supervisors to non-supervisory employees actually supports my finding that hourly supervisors are not Section 2(11) supervisors. In this regard, if I found them to be supervisors, this would result in a ratio of 27 supervisors to 87 rank and file employees—a ratio very close to that found to be "abnormal" in *North Miami Convalescent Home*, 224 NLRB 1271 (1976)(finding 18 supervisors for 54 employees to be abnormally high)—particularly in light of the fact that there is little evidence in the record suggesting non-supervisory employees at the facility require such a level of supervision.

3. Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All hourly employees located at the Employer's facility in Hanford, California; excluding loss prevention officers, and supervisors as defined in the Act.

There are approximately 100 employees in the unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether they wish to be represented for purposes of collective-bargaining by Teamsters Local 517, International Brotherhood of Teamsters. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their

replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

The Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by the Region to assist in determining an adequate showing of interest. The Region shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5224, on or

before **October 15, 2014.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional office by electronic filing through the Agency's website, **www.nlrb.gov**,[15] by mail, by hand or courier delivery, or by facsimile transmission at (510) 637-3315. The burden of establishing the timely filing and receipt of this list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

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[15] To file the eligibility list electronically, go to www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on **October 22, 2014.** This request may be filed electronically through E-Gov on the Agency's web site, www.nlrb.gov,[16] but may not be filed by facsimile.

Dated: October 8, 2014

George Velastegui, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

[16] To file the request for review electronically, go to www.nlrb.gov, select **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions. Guidance for electronic filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter, and is also located on the Agency's website, www.nlrb.gov.

ATTACHMENT FOUR

3859.17-002003

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 32
1301 Clay St Ste 300N
Oakland, CA 94612-5224

Agency Website: www.nlrb.gov
Telephone: (510)637-3300
Fax: (510)637-3315

Download NLRB Mobile App

October 21, 2014

JAMES CHAVEZ
FRY'S ELECTRONICS, INCORPORATED
10555 IONA AVENUE
HANFORD, CA 93230

Re: Fry's Electronics
Case 32-CA-139198

Dear Mr. Chavez:

Enclosed is a copy of a charge that has been filed in this case. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney Noah Garber whose telephone number is (510)637-3314. If this Board agent is not available, you may contact Supervisory Attorney Catherine Ventola whose telephone number is (510)637-3288.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or from an NLRB office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: We seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly. **Due to the nature of the allegations in the enclosed unfair labor practice charge, we have identified this case as one in which injunctive relief pursuant to Section 10(j) of the Act may be appropriate.** Therefore, in addition to investigating the merits of the unfair labor practice allegations, the

Board agent will also inquire into those factors relevant to making a determination as to whether or not 10(j) injunctive relief is appropriate in this case. Accordingly, please include your position on the appropriateness of Section 10(j) relief when you submit your evidence relevant to the investigation.

Full and complete cooperation includes providing witnesses to give sworn affidavits to a Board agent, and providing all relevant documentary evidence requested by the Board agent. Sending us your written account of the facts and a statement of your position is not enough to be considered full and complete cooperation. A refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily.

In addition, either you or your representative must complete the enclosed Commerce Questionnaire to enable us to determine whether the NLRB has jurisdiction over this dispute. If you recently submitted this information in another case, or if you need assistance completing the form, please contact the Board agent.

We will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the Freedom of Information Act and the Federal Records Act. Thus, we will not honor any claim of confidentiality except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material you submit may be introduced as evidence at any hearing before an administrative law judge. We are also required by the Federal Records Act to keep copies of documents gathered in our investigation for some years after a case closes. Further, the Freedom of Information Act may require that we disclose such records in closed cases upon request, unless there is an applicable exemption. Examples of those exemptions are those that protect confidential financial information or personal privacy interests.

Procedures: We strongly urge everyone to submit all documents and other materials (except unfair labor practice charges and representation petitions) by E-Filing (not e-mailing) through our website, www.nlrb.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website, www.nlrb.gov or from an NLRB office upon your request. NLRB Form 4541 offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

George Velastegui

George Velastegui
Regional Director

Enclosures:
1. Copy of Charge
2. Commerce Questionnaire

Copy of charge only sent to:

CHRISTOPHER M. FOSTER, ESQ.
DLA PIPER LLP (US)
555 MISSION STREET
SUITE 2400
SAN FRANCISCO, CA 94105-2933

JOHN E. FITZSIMMONS, ESQ.
DLA PIPER LLP (US)
401 B ST STE 1700
SAN DIEGO, CA 92101-4297

DAVID S DURHAM, ESQ.
DLA PIPER LLP (US)
555 MISSION STREET
SUITE 2400
SAN FRANCISCO, CA 94105

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case	Date Filed
32-CA-139198	10/21/2014

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Fry's Electronics

b. Tel. No. 559-772-3500

c. Cell No.

f. Fax No. 866-230-9584

g. e-Mail

d. Address *(Street, city, state, and ZIP code)*
10555 Iona Avenue
Hanford, CA 93230

e. Employer Representative
James Chavez

h. Number of workers employed
70

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Warehouse

j. Identify principal product or service
Electronic Merchandise

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* 8(a)(3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

Within the last two weeks, the above-named employer has instigated and promoted circulation of a petition against the Union and recorded the names of employees who refused to sign. Employer has also interfered with protected activity by discouraging employees from attending a Union meeting and retaliated against employees for engaging in Union activities. Additionally, the employer has conducted surveillance of employees while engaged in Union activities.

RECEIVED
NLRB REGION 32
2014 OCT 21 AM 10 13
OAKLAND, CA

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Teamsters Local 517

4a. Address *(Street and number, city, state, and ZIP code)*
512 W. Oak Street
Visalia, CA 93291

4b. Tel. No. 559-627-9993

4c. Cell No.

4d. Fax No. 559-627-9039

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)* International Brotherhood of Teamsters

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____ John Provost
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address Beeson, Tayer & Bodine, APC
520 Capitol Mall, Suite 300, Sacramento, CA 95814

10/21/2014
(date)

Tel. No. 916-325-2100

Office, if any, Cell No.

Fax No. 916-325-2120

e-Mail jprovost@beesontayer.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of: FRY'S ELECTRONICS, INC. Employer, and TEAMSTERS LOCAL 517, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Petitioner.	Case No. 32-RC-135431

CERTIFICATE OF SERVICE

I certify that a copy of the Employer's Request for Review of Regional Director's Direction to Hold Election in Abeyance was electronically served on November 6, 2014 to the following parties:

John C. Provost, Esq.
Beeson, Tayer & Bodine, APC
520 Capital Mall, Suite 300
Sacramento, CA 95814-4714
Email: jprovost@beesontayer.com
Counsel for Petitioner

Chester Suniga, Secretary-Treasurer
TEAMSTERS LOCAL 517,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
512 W. Oak Street
Visalia, CA 93291
Email: Chestersuniga@teamsterslocal517.com

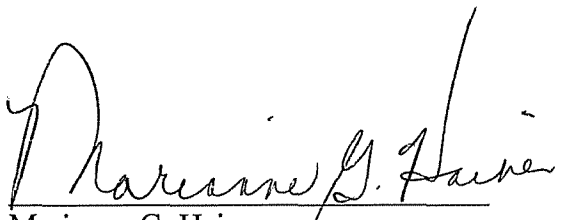
George Velastegui, Regional Director
National Labor Relations Board – Region 32
1301 Clay Street, Suite 300B
Oakland, CA 94612-5224
Email: George.Velastegui@nlrb.gov

Helen Yoon
National Labor Relations Board – Region 32
1301 Clay Street, Suite 300B
Oakland, CA 94612-5224
Email: Helen.Yoon@nlrb.gov
Hearing Officer

Cynthia Rence, Assistant to the Regional Director
National Labor Relations Board – Region 32
1301 Clay Street, Suite 300B
Oakland, CA 94612-5224
Email: Cynthia.Rence@nlrb.gov

Gary Shinners, Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001
Email: gary.shinners@nlrb.gov

Dated: November 6, 2014



Marianne G. Haines
DLA PIPER LLP (US)
555 Mission St., Ste 2400
San Francisco, CA 94105-2933
Telephone: 415.836.2500
Fax No: 415.836.2501